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North Dakota Joint Tenancies: Severance by Contract for Deed

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NOTES

NORTH DAKOTA JOINT TENANCIES: SEVERANCE BY CONTRACT FOR DEED?

A serious and perplexing question has arisen in relatively recent years in the area of joint tenancy law. The question is this: Does the making of a contract for deed by joint tenant vendors sever the joint tenancy so that the vendors then hold as tenants in common? Although the Supreme Court of North Dakota has not yet considered the problem, the Legislature in 1963 enacted a statute declaring that the contract "shall not have the efffect of dissolving the joint tenancy relationship of the vendors if such contract for deed is executed by all the joint tenants unless otherwise specifically provided in the instrument."[1] Assuming for the time being that this statute will adequately uphold the intention of joint tenant vendors who sold their property subsequent to June 30, 1963,[2] there still remains for determination the status of joint tenant vendors under executory contracts which were made prior to that date. Even more important than the rights of these persons and their heirs, however, are the questions raised concerning the condition of the titles of those holding under conveyances by the surviving joint tenant if these contracts have in fact severed the joint tenancy.

Most of the litigation in this area has involved the former question. While the following discussion is founded upon those cases, this note is primarily concerned with the title problem. In other words, can the surviving joint tenant vendor of North Dakota real estate convey a marketable title to the vendee? It is assumed that the contract for deed in no way recognizes the joint tenancy of the vendors and that the property in question has not been included in a probate of the deceased tenants estate.

The problem with which we are dealing was first clearly preented in the 1954 Nebraska case of *Buford v. Dahlke*.[3] There a husband and wife had contracted to sell real estate which they

1. N.D. CENT. CODE § 47-19-54 (Supp. 1965).
2. The effectiveness of this statute is discussed at p. 364 *infra*.
3. 158 Neb. 39, 62 N.W.2d 252 (1954).

owned as joint tenants. When the husband died his executor brought an action to recover half the payments made by the vendee to the surviving wife and for a declaratory judgment that the estate was entitled to half of all future amounts paid on the contract. Relying on an earlier Iowa decision,[4] the Supreme Court of Nebraska unanimously held that the making of the contract to convey severed the joint tenancy.

The reasoning of the court is difficult to follow, but apparently they gave three somewhat inter-related reasons as a basis for severing the joint tenancy: (1) The signing of the contract to convey equitably coverted the real estate of the vendors to personal property because equity will regard as done what in good conscience ought to be done. Treating the transaction as completed, the money in the hands of the vendor is personal property and passes as such to his personal representative. (2) A conveyance of his interest by one joint tenant will effect a severance. A contract to convey executed by one joint tenant will, under the above doctrine of equitable conversion, also effect a severance. Therefore, it "logically" follows that a contract to convey signed by both or all of the joint tenants will bring the same result. (3) The creation and existence of an estate in joint tenancy depends upon the unities of time, title, interest, and possession and the destruction of any one of these will sever the relationship. Here the vendees went into posesssion under the contract. Their possession was in all respects adverse to any possessory rights of the vendors. Thus the unity of possession was destroyed. The unities of interest and title were also destroyed, apparently as a result of the equitable conversion, after which the vendors held only the legal title as security and the right to receive the payments.

Since the contract did not clearly express an intention that the joint tenancy should continue, a severance was effected.

In re Baker's Estate[5] arose out of an almost identical factual situation. After stating it had previously decided the question in the case of *In re Sprague's Estate*,[6] the Supreme Court of Iowa, recognizing that the four joint tenancy unities had by earlier case law given way to the intention of the parties, held that the contract severed the joint tenancy. So far as it related to equitable con-

4. *In re* Sprague's Estate, *infra* note 6.
5. 247 Iowa 1380, 78 N.W.2d 863, 64 A.L.R.2d 902 (1956).
6. 244 Iowa 540, 57 N.W.2d 212 (1953). Rather than writing an opinion, the Supreme Court quoted at length from the lower court's Findings of Fact and Conclusions of Law. Therein the court discussed the effects of an equitable conversion upon a contract of sale and conveyance and said, "the making of this contract. . . destroyed the joint tenancy in the. . . real estate. . . ." *Id.* at 545, 57 N.W.2d at 215. The trial court concluded by saying that the contract worked an ademption of a devise. After adopting this as its opinion, the Supreme Court cited *In re* Miller's Estate, 142 Iowa 563, 119 N.W. 977 (1909) and *In re* Bernhard's Estate, 134 Iowa 603, 112 N.W. 86 (1907) in support of the trial court's holding. Both of these cases held that a contract of sale and conveyance works an equitable conversion so that the vendor holds the legal title as security and in trust for the purchaser. Upon the death of the vendor his interest passes as personal property to his personal representative. Neither of the cases involved joint tenant vendors.

version, the Iowa Supreme Court adopted the views of the Nebraska Court in *Buford v. Dahlke*.[7]

Four of the nine Iowa Justices dissented. They claimed that the only precedent for the majority holding is *Buford v. Dahlke* and that the reasoning of that case as well as the principal case is without merit. Simply because a conveyance, or contract to do so, by one joint tenant will effect a severance does not mean that a contract to convey by all the tenants will bring the same result. In the first situation the contracting or conveying tenant has deprived his cotenant of his right of survivorship, but in the latter the rights and estate of the tenants, though diminished or changed, remain equal. *In re Sprague's Estate* is not authority because there the question of severance was not before the court. The parties had stipulated in advance that the contract severed the joint tenancy. The dissenters go on to discuss many cases and law review articles misinterpreting the holding in *Sprague*, some of which have commented on the flimsy authority upon which the court relied. In response they state that the cited cases are, of course, weak—they were cited for the proposition that the contract worked an ademption of the devise.

The opposing authorities, though greater in number, are probably not much more convincing. An early Irish case[8] and a decision of the Supreme Court of Kansas[9] both held that the contract did not disturb the common law unities and that a mere change in the property from one species to another would not effect a severance. With these exceptions, equitable conversion has been the center of attention. The Illinois[10] and California[11] courts have taken the position that equitable conversion is simply not applicable. The California case, however, was supported by an earlier decision[12] holding that a joint tenancy continues until the tenants have indicated some intention to terminate it. Presumably this is so long as the property can be traced, regardless of how many times its form has been changed. The Supreme Court of Wisconsin, although under a somewhat different factual situation, has also refused to apply the equitable doctrine to sever a joint tenancy.[13]

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7. *Supra* note 3.

8. *In re* Hayes' Estate, 1 Ir. R. 207 (1920), *reversing* 1 Ir. R. 103.

9. Hewitt v. Biege, 183 Kan. 352, 327 P. 2d 872 (1958).

10. Watson v. Watson, 5 Ill.2d 526, 126 N.E.2d 220 (1955); *In re* Estate of Jogminas, 246 Ill. App. 518 (1927); *Cf.* Illinois Public Aid Comm. v. Stille, 141 Ill.2d 344, 153 N.E.2d 59 (1958).

11. County of Fresno v. Kahn, 207 Cal. App. 2nd 213, 24 Cal. Rptr. 394 (1962).

12. Fish v. Security-First Nat. Bank, 31 Cal. 2d 378, 189 P.2d 10 (1948).

13. Simon v. Chartier, 250 Wis. 642, 27 N.W.2d 752 (1947) held that it was immaterial whether or not the then deceased tenant was competent at the time he signed the contract for deed. For authority the court relied upon Kurowski v. Retail Hardware Mut. Fire Ins. Co., 203 Wis. 644, 234 N.W. 900 (1931). There it had been held that a contract by one joint tenant purporting to convey the *entire interest* of both the tenants is valid and enforceable upon the decease of the non-joining tenant because the survivor at that time survives to the whole estate.

Thus, at present Iowa and Nebraska favor severance.[14] Opposed: Illinois, Kansas, California, and apparently Wisconsin.

The majority of the courts considering the question in regard to tenancies by the entireties,[15] like the courts ruling on the issue in joint tenancy situations, have held that the contract did not effect a severance.[16] By and large the theory of these cases has been that the doctrine of equitable conversion is not applicable. Only one tenancy by the entireties case, *Panushka v. Panushka*,[17] has deviated from the majority view. In that case, the Supreme Court of Oregon held, not that an equitable conversion resulted in the severance of the cotenancy, but that only the right to receive payments was converted to personalty. The cotenancy continued in the naked legal title and upon the death of one of the tenants the other survived to the entire legal title as trustee for the purchaser. The remainder of the vendors' interest in the land, having been converted to personalty by the execution of the contract, was thereafter held in common by the tenants.

The foregoing cases exemplify equitable conversion as the chief stumbling block to the solution of the problem. Generally speaking, the non-severance cases stand for the proposition that a conversion and the resulting destruction of the joint tenancy would do violence to the actual intention of the joint tenants. Through some mystical and unexplained process they impute the joint tenancy in the land to the contract right to receive the payments. On the other hand, the three courts rigidly applying equitable conversion apparently believed they owed some "fidelity"[18] or were "fully committed"[19] to the doctrine so that they were all but compelled to apply it. Only *Panushka v. Panushka*[20] held that the vendors' interest was divisible and that the naked legal title which the vendors hold as security for the purchase price is still a real property interest and unaffected by the conversion. The other two equitable conversion cases[21] apparently held that the legal title was also converted to personalty. That being the case, a serious title question is presented when the surviving tenant, thinking he owns the entire remaining

14. At least one other jurisdiction has indicate it would follow the severance view. See Allred v. Allred, 15 Utah 2d 396, 393 P.2d 791 (1964). *Compare* Konecny v. von Guten, 151 Colo. 376, 379 P.2d 158 (1963).

15. It will be assumed that the same principles control in determining whether a contract for deed severs either a joint tenancy or a tenancy by the entireties. Generally this assumption is supported by the court opinions. *E.g. In re* Baker's Estate, *supra note* 5 (dissenting opinion); Hewitt v. Biege, *supra* note 9; Panushka v. Panushka, 221 Ore. 145, 349 P.2d 450 (1960). See 4 THOMPSON, REAL PROPERTY § 1792 (repl. ed. 1961 & 1965 Supp.)

16. Kent v. O'Neil, 53 So. 2d 779 (Fla. 1951); Detroit & Security Trust Co. v. Kramer, 247 Mich. 468, 226 N.W. 234 (1929); *In re* Maguire's Estate, 251 App. Div. 337, 296 N.Y. Supp. 528, *aff'd. without opinion*, 277 N.Y. 527, 13 N.E.2d 458 (1938); *Cf.* Childs v. Childs, 293 Mass. 67, 199 N.E. 383 (1936); *In re* Bramberry's Estate, 156 Pa. 628, 27 Atl. 405 (1893).

17. 221 Ore. 145, 349 P.2d 450 (1960). Although the court cites previous Oregon cases holding that personal property cannot be held by the entireties, it appears that equitable conversion alone would have been a sufficient basis for the holding.

18. Panushka v. Panushka, 221 Ore. 145, 349 P.2d 450 (1960).

19. *In re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863, 64 A.L.R.2d 902 (1956).

20. *Supra* note 17.

21. *In re* Baker's Estate, *supra* note 19; Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954).

interest, conveys in fact as a tenant in common only an undivided interest. We proceed then to a more detailed survey of the possibilities available under the doctrine of equitable conversion.

EQUITABLE CONVERSION

The North Dakota Supreme Court in *Clapp v. Tower*[22] held that upon the vendee's default the personal representative of the vendor could foreclose the contract and that when the property was re-sold the estate was entitled to the proceeds to the complete exclusion of the heirs. Quoting a New York case, the court stated the rationale of the doctrine of equitable conversion:

> Courts of equity regard that as done which ought to be done. They look at the substance of things, and not the mere form of agreements, to which they give the precise effect which the parties intended. It is presumed that the vendor, in agreeing to sell his land, intends that his property shall assume the character of the property in which it is to be converted. . . .[23]

What is the effect of this doctrine upon the contracts of joint tenant vendors? Can it be said to be so inconsistent with the principles of joint tenancy law that it simply is not applicable? If it is applicable, what kind of evidence is sufficient to rebut the presumption of the intention to convert? And further, does it make any difference whether or not there has been an equitable conversion?

Nature of the Interests Created

The above quoted case, *Clapp v. Tower,* clearly held that the contract for deed converted the vendor's real property interest to personalty. No one will dispute that this is the general rule. While general rules make fine guidelines, the first case is yet to be decided on a general factual situation. Each time the courts have been forced to deal with specific facts. *Clapp v. Tower* held not merely that the real property was converted to personalty, but that it was converted to personalty for purposes of administration. This too is a generally accepted rule in this country. Looking back to our first general rule, we must recognize its basis. More precisely—it is a general rule because for most purposes it is held that a contract for deed works an equitable conversion. Perhaps some day it will be necessary to say that as a general rule in North Dakota for purposes of administration a contract for deed will effect an equitable conversion. Be that as it may, this point cannot be over-emphasized:

22. 11 N.D. 556, 93 N.W. 862 (1903).
23. *Id.* at 558, 93 N.W. at 863-64.

> When we speak of conversion we are not describing a condition of the property for all purposes with respect to everybody but are giving a name to a situation resulting from the application of equitable doctrines to a state of facts between certain parties.[24]

While the Supreme Court of North Dakota may in effect be following this single purpose doctrine, they have, indeed, been reluctant to say that a contract did not work an equitable conversion.[25] Instead, the court has attempted to distinguish between the nature of the interests created by a particular conversion. For example, in *Clapp v. Tower* the court said that after the conversion the interest of the vendee was real property and that the interest of the vendor was personalty. Since the conversion passed the equitable interest in the land to the vendee, we get the idea that the vendee of a contract for deed, after a conversion, has a real property interest. This is fine; we have a precedent. Later, however, we find that a statute[26] making a judgment a lien on all "real property" has no application to the vendee's interest—not because it is not real property—but because it is "a mere equitable interest in real property".[27] The latter pronouncement does not overrule the former though; the next case held that a contract for deed was a conveyance of a real property interest within the terms of the recording acts.[28] It seems highly unlikely that the court intended that the effect of a particular contract for deed is to hinge upon whether that contract created an "equitable interest" as opposed to a "mere equitable interest" in the land. The difference probably depends upon whether on that particular issue the tribunal is sitting as a court of equity or a court of law. But if this the case, why should a court of law recognize an equitable conversion? Would it not have been more clear to say that the doctrine of equitable conversion is (or is not) applicable upon this set of facts? The court could have reached identical results and at the same time avoided the semantical problems. The court's attempt to distinguish these cases lends considerable support to the single purpose theory and clearly indicates that equitable conversion is not a doctrine from which to reason.[29]

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24. Pound, *Progress of the Law*, 1918-1919, 33 HARV. L. REV. 813 at 831 (1920).
25. *E.g.* Miller v. Shelburn, 15 N.D. 182, 107 N.W. 51 (1906).
26. N.D. REV. CODE § 7082 (1905) (now N.D. CENT. CODE § 28-20-13 (1960).
27. Cummings v. Duncan, 22 N.D. 534 at 537, 134 N.W. 712 at 713 (1912).
28. Simonson v. Wenzel, 27 N..D. 638, 147 N.W. 804 (1914).
29. In Sox v. Miracle, 35 N.D. 458 at 473-74, 160 N.W. 716 at 721 (1916) the court said, "The case of Simonson v. Wenzel, [*supra* note 28], indeed, did not attempt to overrule the prior case of Cummings v. Duncan [*supra* note 27] . . . and the two decisions must be taken together. We held in Cummings v. Duncan that the interest of the purchaser under the land contract was a mere *equitable estate or interest*. Being such an interest and an interest which affected the title, it was a conveyance under the terms of the recording act in the case of Simonson v. Wenzel. We held in the Cummings' Case, however, that it was not real property, and the ruling in the Simonson case in no way repudiated that holding." A careful reading of the Cummings case leaves little doubt as to what the holding was: The statute, *supra* note 26, "has no application to mere equitable interests in *real property;* but it confers, and was intended to confer, a lien only on the legal title held by the judgment debtor." (Emphasis Supplied) It is true that the court in Cummings v. Duncan also spoke of the effect of a contract for deed at law, but if there was no conversion and the rights and obligations created by the contract remained strictly

The court's treatment of the vendee's interest illustrates the confusion which the application of the doctrine of equitable conversion can create, but it is the nature of the vendor's interest with which we are primarily concerned. If the previously discussed equitable conversion cases in Nebraska, Iowa, and Oregon were correctly decided, preservation of the title of those claiming under conveyances by surviving joint tenant contract vendors compels us to find a real property interest remaining in the vendors after they executed the contract.

It does not appear that the Supreme Court of North Dakota has ever held that the vendor has a real property interest after a conversion.[30] Although there are indications to the contrary, the pronouncement in *D.S.B. Johnston Land Co. v. Whipple*[31] seems particularly significant. There the court held that when the vendee failed to obtain the vendor's consent to an assignment of a contract the vendor could waive his right to rescind and sue for the unpaid balance. Property values were depressed and in holding that the vendor was entitled to a deficiency judgment the court said:

> [I]t is not very important, in our opinion, what the security so retained is called, whether a trust, a vendor's lien, an equitable mortgage, an equitable security, or any other kind of lien. * * * * Where the title is retained by the seller as security for the payment of the debt, the security is, in this country, very generally regarded as possessing all the essential features of a mortgage, and the vendor as standing for all practical purposes as mortgagee in relation to the vendee.[32]

It is firmly established in North Dakota that a mortgagee has no interest in the land.[33]

By way of dictum the North Dakota Supreme Court has held

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personal, where did the vendee get his equitable interest in real property? Perhaps the court was confused by the language they used in Simonson v. Wenzel when explaining the holding in Cummings. Concerning statements which were obviously dictum in Cummings v. Duncan the court said, "We there expressly held that the vendee's equitable interest in the real property under such a contract could be levied upon and sold under execution." This language was used to support the view that the vendee "had an estate or interest in the land which he could sell, assign, or mortgage. . . ."

The question then is: Does the vendee of an equitably converted contract have a real or personal property interest? If it demands an answer it would seem that it can only be given with respect to the purpose for which the determination is being made. This at least would be the answer if we could say in correlation thereto that there was or was not a conversion. The North Dakota Court, however, is putting us in a position where at times it may be necessary to say simply that the vendee for this particular purpose has a real property interest, but it is a different sort of real property interest of a lesser quantity or quality. This confusion has apparently resulted from the court's failure to recognize the nature of the equitable doctrine. It's a use it when you need it forget it when you don't doctrine. The conclusion in one case need not necessarily lead to the next. While it is true that we still would not know whether a contract would work a conversion in a particular situation, we could at least spend our time arguing the equities or effects of its application or non-application, rather than trying to distinguish cases which are not distinguishable.

30. *E.g. In re* Ryan's Estate, 102 N.W.2d 9 (N.D. 1960); Woodward v. McCollum, 16 N.D. 42, 111 N.W. 623 (1907); Clapp v. Tower, 11 N.D. 556, 93 N.W. 862 (1903).

31. 60 N.D. 334, 234 N.W. 59 (1930).

32. *Id.* at 343, 234 N.W. at 63.

33. Fischer v. Hoyer, 121 N.W.2d 788 (N.D. 1963); Mechtle v. Topp, 78 N.D. 785, 52 N.W.2d 840 (1952); Federal Farm Mortg. Corp. v. Berzel, 69 N.D. 760, 291 N.W. 550 (1940).

that a judgment will attach only to the judgment debtor's "actual"[34] or "real interest in the real property, and not to his apparent interest."[35] *Redman v. Biewer*[36] held that a judgment against one who held the naked legal title as trustee would not attach to the land. Although it is often said that the vendor of a contract for deed holds the naked legal title in trust and that his interest is personalty, *Redman* may not control the situation when it is claimed that a judgment does not attach to the interest of a contract vendor. The trust relationship there was due to a resulting trust and the court had found that the judgment debtor had never had a beneficial interest. If when the question is presented it is found that there was an equitable conversion, it would seem that the judgment would not attach because the statute[37] requires that the debtor have a real property interest. However, when considered in the light of *Cummings v. Duncan*[38] it is possible that it might attach to the vendor's interest. *Cummings* held that it was never intended that a judgment should attach to the "mere equitable interest" of the vendee; it did not hold that his interest was not real property. The converse of this, with the aid of dictum in *Cummings v. Duncan* would be that it was intended to attach to the "legal title" whether it be real or personal property. Which of these views, if either, the court would accept no one can say; but if it is the latter, it should be no different than holding that joint tenant vendors hold whatever interest they have in the naked legal title as joint tenants.

In addition to holding that the interest of the vendor was personal property for purposes of administration, *Clapp v. Tower*[39] by way of dictum intimated that under some circumstances the vendor after a conversion might have a real property interest. The specific statement says that if there has been no default and the vendor dies before the contract is fully executed, the heir of the vendor may be compelled to convey in accordance with the terms of the contract. The weight to be given this statement is depreciated by the fact that it is part of a larger quote from an earlier New York decision.[40] Furthermore, the statement was probably dictum in the New York case and no indication is given as to why the action for specific performance would be against the heir rather than the personal representative.

This dictum, however, should not be lightly dismissed as an utterance of a confused court. Likening the vendor's interest to a lien, John N. Pomeroy said:

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34. Dalrymple v. Security Improvement Co., 11 N.D. 65 at 71, 88 N.W. 1033 at 1036 (1902).
35. Zink v. James River Nat. Bank, 58 N.D. 1 at 7, 224 N.W. 901 at 903 (1929).
36. 78 N.D. 120, 48 N.W.2d 372 (1951).
37. N.D. CENT. CODE § 28-20-13 (1960).
38. 22 N.D. 534, 134 N.W. 712 (1912).
39. 11 N.D. 556, 93 N.W. 862 (1903).
40. Williams v. Haddock, 145 N.Y. 144, 39 N.E. 825 (1895).

> This lien, like every other equitable lien, is not an interest *in the land,* is neither a *jus ad rem* nor a *jus in re,* but merely an encumbrance. * * * Although the land should remain in the possession and in the legal ownership of the vendor, yet equity, in administering his whole property and assets, looks not upon the land as land,—for that has gone to the vendee,—but looks upon the money which has taken the place of the land; that is, *so far as the land is a representative of the vendor's property, so far as it is an element in his total assets, equity treats it as money,* [italic type supplied] as though the exchange had actually been made, and the vendor had received the money and transferred the land. Although the legal title to the land would still descend to the vendor's heirs upon his death, still when the vendee afterwards completes the contract, takes a conveyance of the legal title *from the heirs,* and pays the price, the money, being all the time an element of the vendor's assets, and being, therefore, all the time a part of his personal and not his real property, goes to his administrators or executors. . . .[41]

These statements apparently mean that the vendor's entire beneficial interest, including the lien are personal property; but the naked legal title, which complements or supports the lien, is still real property. If this is in fact the law of North Dakota, the surviving joint tenant vendor should survive to the entire interest in the naked legal title. A mere lessening of the interest the cotenants own in the joint tenancy property would not seem to effect a severance because any "legal or equitable title to or interest in any real property"[42] is sufficient to support a joint tenancy. It is upon this basis that the courts in New York[43] and Oregon[44] have avoided the title problem which seems to now exist in Iowa and Nebraska.

The relevance of the previous discussion, with the possible exception of the dictum in *Clapp v. Tower,* is probably limited to showing the opposing authority one faces when trying to establish: (1) that a contract did not work a conversion, or (2) that if there was a conversion the vendor retained a sufficient interest to avoid a severance of the joint tenancy. Only the court can say whether the single purpose doctrine will previal and if not, whether a real property interest, if necessary, can be distinguished to the vendor.

The Intention to Convert

The previously quoted language from *Clapp v. Tower*[45] says that by selling his property on a contract for deed the vendor is

41. 1 POMERY, EQUITY JURISPRUDENCE § 368 (4th ed. 1918). See MCCLINTOCK, EQUITY § 106 (2nd ed. 1948). After a conversion "the legal title of the vendor is still real property, but all his beneficial interests are personalty, including the security interest which equity attaches to the right to receive the money."
42. N.D. CENT. CODE § 47-10-23 (1960).
43. *In re* Keyworth's Estate, 13 Misc.2d 688, 180 N.Y.S.2d 37 (Surr. Ct.) (citing Williams v. Haddock, *supra* note 40) *aff'd sub nom.* Keyworth's Estate v. Davis, 19 App. Div. 2d 688, 241 N.Y.S.2d 616 (1963).
44. Panushka v. Panushka, 221 Ore. 145, 349 P.2d 450 (1960).
45. See text to note 23 *supra.*

presumed to have intended that there should be a conversion. As with all presumptions, the question is what sort of evidence may be used to rebut it? The three cases in other jurisdictions which found that the contract worked an equitable conversion refused to go beyond the four corners of the contract when searching for the intention of the vendors.[46] Although none of these cases were explicit as to the reasoning behind their view, the possibility of a parol evidence issue is present. It may be that a latent ambiguity will exist between the deed creating the vendors' joint tenancy interest and the contract[47] or that the parties and their privities rule[48] will allow the admission of parol to prove the actual intention of the vendors. These possibilities will depend upon the factual situation from which the question is presented, however, and are beyond the scope of this note.

In one situation the intention that the property should not be converted has been supplied by the legislature. The statute provides:

> An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal, but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors if the same had passed by succession.[49]

The North Dakota Court in *Shure v. Dahl*[50] held that this statute under the circumstances prescribed therein would prevent an equitable conversion. While speaking of the conversion doctrine laid down in *Clapp v. Tower*, the court said:

> [T]he purpose of the statute was to avoid the results of such strictly technical reasoning and to prevent a devisee from losing the benefit of the devise merely because the nature of interest of the testator in the property had changed by operation of law as a result of a contract for sale.[51]

While this statute is of course not applicable to joint tenancies,[52] it would seem arguable at least, that together with the court's

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46. *In re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863, 64 A.L.R.2d 902 (1956); Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954); Panushka v. Panushka, *supra* note 44.
47. *Cf.* Lane v. Aldrich, 48 N.D. 1086, 189 N.W. 329 (1922); Harney v. Wirtz, 30 N.D. 292, 152 N.W. 803 (1915).
48. *E.g.* Kittelson v. Collette, 61 N.D. 768, 240 N.W. 920 (1932); State Bank of Ardock v. Burke, 53 N.D. 871, 208 N.W. 115 (1926); Luther v. Hunter, 7 N.D. 455, 75 N.W. 916 (1898).
49. N.D. CENT. CODE § 56-04-11 (1960).
50. 80 N.W.2d 825, 62 A.L.R.2d 953 (N.D. 1957).
51. *Id.* 80 N.W.2d at 826, 62 A.L.R.2d at 956.
52. A joint tenancy is not an estate of inheritance. The interest of the deceased tenant passes to the others by force of the instrument which created the joint tenancy so there is nothing upon which a will can operate. Hagen v. Schluchter, 126 N.W.2d 899 (N.D. 1964); *In re* Kaspari's Estate, 71 N.W.2d 558 (N.D. 1955). Since the statute, *supra* note 49, applies only to wills, the joint tenancy would negate such a devise before the will became operative.

statement of its purpose, it presents a close analogy. If tenants in common made a joint and mutual will and then sold the property by contract for deed, it would seem that the statute would require that the survivor take the whole of the property. Should the position of joint tenants be different? Whether the court would accept the definition or not, a joint tenancy is regarded by many lay people as a poor man's will. Using an analogy to the statute for holding that the joint tenancy was not severed would not be contrary to *Clapp v. Tower*, assuming that the decision there is applicable only to the property of an intestate,[53] because the intestate has expressed no intention as to the disposition of his property. This returns us to the starting point. What is intent? Is it what a contract unambiguous on its face declares, or should weight be given to what the parties may have actually had in mind? In other words, should the possibility that the parties, their banker, their real estate broker, or even their attorney may have chosen the wrong contract for deed form or failed to properly modify it be considered?

It might also be noted that the above quote from *Shure v. Dahl* contains strong language for a mere interpretation of legislative intent. Perhaps it means something more. When the court speaks of the "strictly technical reasoning" of the doctrine of equitable conversion which prevents the devisee from taking "merely because the nature of interest . . . had changed by operation of law as the result of a contract for sale", it may indicate a liberalization of the court's attitude toward the conversion doctrine. On the other hand, it might also mean that a statute is necessary to prevent a conversion unless a different intention appears in or subsequent to the contract.

JOINT TENANCIES

Up to this point it has been assumed that a real property interest in the vendors after executing the contract is necessary to the preservation of the joint tenancy. However, it is possible that the name used in classifying the vendors' interest will make no difference in the end result because joint tenancies may be created in personal property[54] as well as real property. To avoid severance of the joint tenancy in the naked legal title under this theory, it would be necessary for the court to hold that the joint tenancy in the former real property interest is sufficient to preserve or create a similar method of holding in the personal property interest. While the idea may contain little logic, it is similar to what was done

53. The deceased had executed a will, however, a previous case, Penfield v. Tower, 1 N.D. 216, 46 N.W. 413 (1890), had held that it was inoperative so far as North Dakota real estate was concerned. The statute, *supra* note 49, was in effect at the time the court decided Clapp v. Tower, 11 N.D. 556, 93 N.W. 862 (1903), but it was not mentioned in the opinion.

54. N.D. CENT. CODE §§ 47-11-14; 47-11-15 (1960).

in the non-severance cases.[55] Those cases were concerned with who was entitled to the proceeds from the sale. Since they held there was no conversion, they had to impress the contract right to receive the payments, a completely separate interest, with the joint tenancy in the land. The North Dakota Court need not go that far to protect land titles. After a conversion we are concerned with what we refer to as a naked legal title. Prior to the conversion it was part of what was a complete real property interest of one sort or another which was held in joint tenancy. Even after the conversion, whether it is called real property or personal property, it is still a part or derivative of that same interest. It is no more illogical to say that the retained partial interest is entitled to the same joint tenancy characteristics as its former whole, than it is to say that because of a fictional conversion it has lost them. This theory, however, may depend upon whether the contract creates a new joint tenancy in personal property or whether it is merely a continuation of the old one, because it has been provided by statute[56] that a joint tenancy interest cannot exist unless it is declared to be one at its creation.

In view of the extreme shortage of joint tenancy law in North Dakota, conclusions like the one immediately preceding are little more than a guess. While it might be said that our joint tenancies are a creature of statute, they are not dealt with in the usual code style which attempts to cover the entire body of law in that area. This factor, together with our all but non-existent case law, makes it impossible to predict with any degree of accuracy what will be adopted as the joint tenancy law of North Dakota. At common law the creation and continued existence of an estate in joint tenancy was dependent upon the unities of time, title, interest, and possession.[57] A few jurisdictions, however, have rejected this standard and held that the intention of the parties is controlling.[58] While the Supreme Court of North Dakota has spoken in the language of the common law joint tenancies, this was only to explain the nature of ownership and that a joint tenancy is not an estate of inheritance.[59] Also, the North Dakota statute appears to set out the common law unities.[60] These statutory provisions, however, could be construed

55. *E.g.* County of Fresno v. Kahn, 207 Cal. App.2d 213, 24 Cal. Rptr. 394 (1962); Watson v. Watson, 5 Ill.2d 526, 126 N.E.2d 220 (1955); Hewitt v. Biege, 183 Kan. 352, 327 P.2d 872 (1958).

56. N.D. CENT. CODE § 47-02-08 (1960).

57. 2 AMERICAN LAW OF PROPERTY § 6.2 (Casner ed. 1952).

58. *E.g.* Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Hewitt v. Biege, 183 Kan. 352, 237 P.2d 872 (1958); Therrien v. Therrien, 94 N.H. 66, 46 A.2d 538, 166 A.L.R. 1023 (1946). See Annot. 1 A.L.R.2d 247 (1948) for numerous cases holding that a right of survivorship was created although the conveyance was not sufficient to meet the common law unities requirement.

59. *In re* Kaspari's Estate, *supra* note 52.

60. N.D. CENT. CODE § 47-02-06 (1960) defines a joint interest as "one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." Compare this with 2 BLACKSTONE *180 which says "joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."

as a limitation on a pure intention test.[61]

One thing seems certain. If the contract for deed works an equitable conversion and the previous North Dakota cases control the effect to the end that not even the naked legal title is real property, the common law view would require the destruction of the unities unless the vendor's interest can be impressed with the joint tenancy characteristics of the interest he once had in the land. Otherwise the vendor has no interest in or title to real property.

STANDARD AND STATUTE

The North Dakota Bar Association in 1954, shortly after the decisions of *In re Sprague's Estate*[62] and *Buford v. Dahlke*[63] adopted a title standard declaring that "when all the joint tenants contract for the sale of real property, any future conveyance by a surviving joint tenant or tenants will not create a marketable title."[64] Appended to the standard is a note indicating that this is merely a precautionary measure until the question is settled by the Supreme Court.

In 1963 the Legislature enacted a statute providing that a contract for deed "shall not have the effect of dissolving the joint tenancy relationship of the vendors if such contract for deed is executed by all the joint tenants unless otherwise specifically provided in the instrument."[65] The Bar Association then amended their standard to read in substantially the same words adding only the effective date of the statute.[66] This second standard also contains a warning that titles based upon conveyances by surviving joint tenant vendors of contracts executed prior to that date are questionable. It is possible, however, that the effectiveness of both the title standard and the statute are also questionable. *Buford v. Dahlke*[67] and *In re Baker's Estate*[68] both indicated that there would have been no severance had the contract shown such an intention. The *Buford* case did not stop there. The court said that the language purporting to make the agreement binding upon the heirs, executors, administrators, and assigns clearly showed that the parties intended that the contract should sever the joint tenancy. Although the cotenancy in the naked legal title was not severed in *Panushka v. Panushka*,[69] the court pointed to similar language and said that it indicated that

61. For example, Therrien v. Therrien, *supra* note 58, held that a person could convey to another "to be held by him with this grantor in joint tenancy . . . " and thereby create a joint tenancy. The North Dakota statute, *supra* note 60, may well prohibit such a holding in this State. Under N.D. CENT. CODE § 47-10-23 (1960) however, a joint tenancy can be created by one conveying to himself and another as joint tenants, with right of survivorship.
62. 244 Iowa 540, 57 N.W.2d 212 (1953).
63. 158 Neb. 39, 62 N.W.2d 252 (1954).
64. North Dakota Bar Association Title Standards § 1.12 (1954).
65. N.D. CENT. CODE § 47-19-54 (Supp. 1965).
66. North Dakota Bar Association Title Standards § 1.12 (1963).
67. *Supra* note 63.
68. 247 Iowa 1380, 78 N.W.2d 863, 64 A.L.R.2d 902 (1956).
69. 221 Ore. 145, 349 P.2d 450 (1960).

the parties did not intend to hold the right to the installment payments with right of survivorship. On these bases one might question whether the terms "otherwise specifically provided" as used in the statute, or some legislative intent would prohibit a severance.

The effectiveness of the statute may be even more questionable if the drafters intended that it should not only prevent a severance of the joint tenancy in the realty, but also entitle the vendors to hold the right to receive the payments as joint tenants. It provides that absent a contrary intention the contract will not sever the joint tenancy. Assuming there is no intention to sever the joint tenancy a contract executed after the effective date of the statute will undoubtedly allow the survivor to convey a complete title to the vendee. But that is the only joint tenancy there is unless the contract specifically creates one in the right to receive the payments. The Oregon Legislature appears to have eliminated this question by providing that when two or more persons sell real property on a contract for deed "the right to receive payment of deferred installments of the purchase price shall be owned by them in the same proportions, and with the same incidents, as title to the real property was vested in them immediately preceding the execution of the contract of sale" unless a contrary purpose is expressed in the contract.[70] The following sections of the statue erase any doubt which might remain by making specific provisions for cases where the contract is signed by one having no interest in the real property prior to the sale and where it was previously owned subject to any right of survivorship. The non-severance cases,[71] however, found the surviving tenant was entitled to all the proceeds without the aid of such a statute.

CONCLUSION

This note has attempted to present possible means for finding that a contract for deed does not sever the vendors' joint tenancy in their remaining interest to the end that the survivor will be able to convey that whole interest. Probably the best reasoned view is that there was no conversion. The doctrine of equitable conversion should be applied only to reach a desired result and establish a precedent only in cases with similar facts.

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70. ORE. REV. STAT. § 93.240 (1964).
71. Authorities cited note 55 *supra*.